

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RANDEL & ASSOCIATES, P.C., a/k/a  
DICKSON RANDEL & COMPANY, P.C.,

Plaintiff/Counterdefendant-  
Appellee,

v

ZERBO MULLIN & ASSOCIATES, P.C.,

Defendant/Counterplaintiff/Third-  
Party Plaintiff-Appellant,

and

ZERBO CONSULTING GROUP, P.C.,

Third-Party Plaintiff-Appellant,

and

MICHAEL RANDEL and SAMUEL P. RAGUSO,

Third-Party Defendants-Appellees.

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RANDEL & ASSOCIATES, P.C., a/k/a  
DICKSON RANDEL & COMPANY, P.C.,

Plaintiff/Counterdefendant-  
Appellee,

v

ZERBO MULLIN & ASSOCIATES, P.C.,

Defendant/Counterplaintiff/Third-  
Party Plaintiff-Appellant,

and

UNPUBLISHED  
September 15, 2009

No. 274753  
Oakland Circuit Court  
LC No. 2005-069593-CK

No. 279159  
Oakland Circuit Court  
LC No. 2005-069593-CK

ZERBO CONSULTING GROUP, P.C.,

Third-Party Plaintiff,

and

MICHAEL RANDEL and SAMUEL P. RAGUSO,

Third-Party Defendants.

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Before: Gleicher, P.J., and K.F. Kelly and Murray, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, material questions of fact exist with regard to whether the parties mutually agreed that the accounting practice sale would close no later than June 3, 2005. Furthermore, I believe that the majority's determination to the contrary conflicts with the legal standards governing summary disposition and settled law regarding contract interpretation.

#### I. Underlying Facts

In April 2005, the parties entered into two separate contracts: a purchase and sale agreement involving the Randel & Associates accounting practice, and an escrow agreement concerning the fate of Zerbo Mullin & Associates, P.C.'s \$10,000 earnest money deposit. The purchase agreement's closing provision stated as follows:

7. *The Closing.* The closing of the purchase of the Business Assets (the "Closing") shall take place at the office of Richard J. Alef L.L.M. P.C., located at 30445 Northwestern Hwy. Ste. 230, Farmington Hills, Michigan, on or before \_\_\_\_\_, 2005, or at such other time or at such other place as may be agreed upon by the parties hereto (the "Closing Date").

Like the purchase agreement, the escrow agreement failed to identify a specific closing date. However, it documented that Zerbo Mullin could recover the \$10,000 deposit under several different circumstances, including its termination of the purchase agreement within 21 days of the date of execution "for failure to satisfy the financing contingency . . . ."

Richard Alef, counsel for Zerbo Mullin, explained at his deposition that when his clients signed the purchase and escrow agreements, he anticipated that the closing would occur "as soon as we could get the documents completed." Alef averred that the two contracts deliberately omitted a precise closing date because "we weren't sure of when the closing day was going to be," and Alef "didn't even know the month." Alef further asserted regarding the unassigned closing dates as follows:

A. . . . [Y]ou just never know what's going to happen, so you do the best you can.

Q. Well, what were your concerns at that time that you thought it might be—if I'm understanding you right, you thought like any closing, there could be delays, is that what you're saying?

A. Yes.

Q. Other than some unanticipated delay that could affect any closing, did you have any specific concerns with respect to this closing?

A. No, not at the time. I just know better.

Q. Right. So that's why you left it blank?

A. Correct. That's why we left it blank, we being Eric Weiss and myself.

Q. Now, at that time before the Purchase Agreement was signed, you had advised him that you anticipated a closing would take place shortly after the Purchase Agreement was signed, is that correct?

A. Yes.

Q. And you've got nothing specific in terms of why that anticipation wouldn't be realized but it's your testimony that because something could happen, you didn't want to put in a closing date?

A. Yes.

After Randel & Associates and Zerbo Mullin executed the two contracts, the parties exchanged letters and emails about the closing date. Initially, the correspondence reflected that the parties contemplated closing in May 2005. On May 16, 2005, Alef advised Eric Weiss, the attorney representing Randel & Associates, that because third-party defendant Samuel P. Raguso refused to discharge an "improper" UCC lien, the lender would not proceed with financing. Alef also informed Weiss that Zerbo Mullin was exploring alternative funding options. On May 18, 2005, Weiss transmitted a letter to Alef announcing that Michael Randel had agreed to extend the "due diligence period" in the escrow agreement for seven days, allowing Zerbo Mullin until May 25, 2005 to terminate the deal without sacrificing the \$10,000 escrow deposit. In the next paragraph, Weiss requested that John Zerbo and Mark Mullin individually sign a copy of the letter, and added,

By executing this letter, they agree that (I) the financing contingency is the only remaining contingency, (II) the Deposit will be refundable through May 25, 2005, but only to allow them to satisfy their financing contingency and not for any other reason and, thereafter, the Deposit will be non-refundable for any and all reasons, and (III) there will be no further extensions.

Weiss's letter then recounted Alef's representation that Zerbo Mullin "would be ready to close this Monday, May 23, 2005," and reported Randel's unavailability that day. The letter proposed that the closing could occur on May 24 or 25, 2005. Zerbo, Mullin and Randel signed the letter on May 18, 2005.

Meanwhile, Zerbo Mullin and its counsel attempted to resolve the UCC lien issue with Raguso. On May 27, 2005, Paul K. Villarruel, an attorney for Zerbo individually, wrote to Raguso's counsel demanding that Raguso discharge the UCC lien within two business days. The letter averred that Raguso's lien "seriously jeopardizes" the ability of Zerbo and Zerbo Mullin to "purchas[e] . . . certain business assets and engage[] in other matters." According to Villarruel, "unless your client's filing statement is immediately removed, such entities will not be able to proceed with their transactions." On June 1, 2005, Villarruel again wrote to Raguso's counsel and reiterated the demand that Raguso release his lien. The letter further advised,

Your client's unlawful lien filings will cause financing that ZMA has arranged not to close. If that happens, not only will ZMA lose all fees and costs it has paid to obtain such financing, your client is well aware that ZMA is depending upon a significant portion of those loan proceeds to purchase the accounting practice of a third party. *If these transactions do not close on Friday, June 3, 2005, this opportunity will be lost.* Your client will be held accountable for all damages sustained as a result of ZMA's loss of financing and business opportunity. [Emphasis supplied.]

On June 9, 2005, Weiss wrote to Alef expressing frustration with respect to the delay in closing the deal and summarizing the chain of events that followed the parties' execution of the purchase agreement. In the letter, Weiss recalled that Alef had offered June 1, 2005 as a potential closing date, but later left a message indicating that the closing would be delayed until June 3, 2005. Weiss also recounted a June 2, 2005 telephone conversation with Alef in which Alef advised that the Raguso lien problem remained unresolved, and that his clients still lacked financing. Weiss added that "[u]nless I hear otherwise from you by July 15, 2005, I will be releasing the escrow Deposit to my client, as liquidated damages, to partially compensate him for your clients' breach of contract."

Alef responded by urging that the "deal can still be secured" and would be "turn key once this last detail [alternate financing] is established." In a June 23, 2005 letter to Weiss, Alef reported that the dispute with Raguso had resolved. Alef also maintained that "the bank is ready" and that he continued to hope that Randel would "come back to the table and consummate this deal."

In response, Weiss asserted that Randel would consider a new deal with Zerbo Mullin, but that the April 27, 2005 purchase agreement had terminated because of Zerbo Mullin's failure to timely "satisfy the financing contingency." Weiss again recapitulated the events leading to the delays in closing, and represented that Randel had not objected to the June 3, 2005 closing date. Weiss further stated in relevant part as follows:

So, arguably, the last agreed upon closing date was June 3rd. As you will recall, I telephoned you on June 2nd and you stated that the closing would not take place on June 3rd. No requests for extensions were made and none were granted.

\* \* \*

. . . [Randel] was ready, willing and able to close this deal anytime after

April 27, 2005 through the extended closing date of May 25, 2005 and even at the close of the following week, through June 3rd. . . .

\* \* \*

It is now July 5, 2005. My client has heard from Harlan Freeman that a new deal had been proposed to increase the purchase price based on my client's increased client base. He further heard that your clients, while still trying to obtain financing, would not be able to do so by the end of this week, but possibly by July 15th.

The agreement of April 27, 2005 is dead as a result of your client's failure to obtain financing within the agreed upon time frame. If your clients are able to obtain financing, you may feel free to propose a new deal to acquire Mike Randel's accounting practice for his consideration. In the meantime, I must restate my demands from my June 9, 2005 letter that Mike Randel's client list be returned by July 15th and that, unless you have a position contrary to my claim that Mike Randel is entitled to the deposit, I will be releasing the escrow deposit to him on July 15th as liquidated damages.

On August 2, 2005, Alef wrote to Weiss that Zerbo and Mullin "have take[n] the position that the closing is still viable and contractually valid," and that he had scheduled the closing for August 5, 2005. On August 4, 2005, Weiss reiterated Randel's belief that no agreement remained pending, and that Randel would not attend the "unilaterally scheduled closing on August 5th, 2005."

## II. Analysis of the Parties' Dispute

According to the majority, the evidence "indisputably" demonstrates that "the parties agreed to several closing dates and that plaintiff granted Zerbo Mullin several extensions, and that the latest date agreed upon as an extension was June 3, 2005." *Ante* at 12, 14. I respectfully disagree that the evidence gives rise to no genuine factual issues with respect to whether the parties had mutually agreed that June 3, 2005 would serve as the final, nonmodifiable closing date. Application of the standards governing summary disposition compels the conclusion that a material factual dispute exists regarding whether the parties mutually agreed that June 3, 2005 would serve as the ultimate and nonmodifiable closing date. Basic contract law principles also weigh against the circuit court's grant of summary disposition to Randel & Associates and the majority's affirmance of this order.

### A. Summary Disposition Standards and Their Application

When considering a motion for summary disposition under MCR 2.116(C)(10), a court must view the evidence submitted in the light most favorable to the party opposing the motion. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts asserted by the movant." *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982).

When a court affords “the benefit of reasonable doubt to the opposing party” and identifies an issue about which reasonable minds “might differ,” summary disposition cannot be granted. *West*, 469 Mich 183. These principles apply in reviewing a motion for summary disposition in the context of a contractual interpretation issue: “if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists.” *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

In brief, these summary disposition standards mandate that a court examine all the admissible evidence submitted, give credence to the facts and all reasonable inferences supporting the *nonmovant’s* version of the truth, and refrain from weighing the evidence presented. Stated differently, a court must consider whether a fair-minded jury could find in favor of the nonmoving party if it believed the nonmovant’s evidence, in conjunction with the reasonable inferences flowing from the evidence as a whole, and disbelieved the movant’s evidence.

In support of the majority’s opinion that the parties agreed to close on June 3, 2005, the majority cites “[c]orrespondence from Weiss to Alef,” and the June 1, 2005 letter from Villarruel to Raguso’s attorney, in which Villarruel stated that if Zerbo Mullin could not obtain financing by June 3, 2005, “the opportunity to purchase the accounting practice ‘will be lost.’” *Ante* at 13-14. But in my view, other facts in evidence and the reasonable inferences arising therefrom tend to establish a genuine issue of fact that June 3, 2005 did not constitute a final, nonmodifiable closing date.

The majority neglects to specifically identify the “[c]orrespondence from Weiss to Alef” that, when viewed in the light most favorable to Zerbo Mullin, eliminates any dispute about the existence of a firm and final closing date. Weiss’s last letter to Alef before June 3, 2005, dated May 18, 2005, reads, in pertinent part,

Mike Randel is willing to extend the due diligence period in section 1b of the Escrow Agreement by seven (7) days. As the agreement currently provides, your clients may terminate within 21 days of April 27, 2004 [sic] or else the Deposit becomes non-refundable. The last date for the Deposit to be refundable is today, May 18, 2005.

The letter’s final paragraph referenced possible closing dates of May 24 or 25, 2005, but nowhere hinted that the deal itself would terminate if the parties failed to close by either of these dates. Furthermore, the letter also suggested that after May 25, 2005, “the [escrow] Deposit will be non-refundable for any and all reasons, and ... there will be no further extensions.” Yet despite this language, Randel later extended the date for refunding the escrowed deposit to July 15, 2005. From these facts, one could infer quite reasonably that the parties recognized that the closing date for the deal would remain flexible, and that closing would not occur until Zerbo Mullin’s financing problems resolved.

According to Randel, Alef called Weiss and left a voicemail message agreeing that the closing could take place on June 3, 2005. But no evidence suggests that the attorneys agreed during their conversation that the June 3 date could not be modified, or that the deal would terminate if not closed on June 3, 2005. A jury could reasonably infer that in the absence of either documentary evidence or testimony identifying a firm and final closing date, the parties

remained at liberty to modify the June 3, 2005 date in the same manner as they had all previously selected closing dates. A jury could also rationally infer that Villarruel's statement to Raguso's attorney, that the opportunity to purchase the accounting practice would be "lost" after June 3, 2005, amounted to hyperbolic puffery expressed by an attorney not engaged in the actual accounting practice purchase negotiations, intended to coerce settlement of the underlying UCC controversy with Raguso. And in affidavits filed in the circuit court, both Zerbo and Mullin disputed that they had ever committed to a "firm closing date of June 3, 2005."

A reasonable fact finder could readily conclude that in the absence of any documentary evidence mentioning June 3, 2005, created before that date, the parties simply did not reach a meeting of the minds that the deal would close or terminate on June 3, 2005. A fair-minded jury also could decide that Weiss's concession that "*arguably*, the last agreed upon closing date was June 3<sup>rd</sup>" (emphasis supplied), means exactly that: a disagreement existed concerning the last agreed upon closing date. As discussed in greater detail, *infra*, the contract law principles applicable to this case require that to uphold any contractual modifications, *clear and convincing* evidence must demonstrate that the parties mutually agreed to the modification. Here, however, neither clear nor convincing evidence tends to support that any contractual modification (1) established June 3, 2005 as a final date for the closing, or (2) provided for automatic termination of the deal if closing did not occur on June 3, 2005.<sup>1</sup>

If the standards governing summary disposition supply guiding principles rather than merely meaningless boilerplate routinely recited at the commencement of every summary disposition analysis, those standards require that a jury resolve this case. A reasonable jury could determine that the parties never achieved a meeting of the minds with regard to a nonmodifiable closing date because no documentary evidence set forth an understanding that the parties had mutually acquiesced to a firm and final date, and the parties' course of dealing reflected that the closing would occur when Zerbo Mullin secured financing. Summary disposition principles dictate that a court may not choose among competing inferences, ignoring some and viewing others with special weight. Because multiple reasonable inferences support that the parties did not mutually agree that June 3, 2005 would constitute the final closing date beyond which the purchase agreement would terminate if closing did not occur, I would reverse.

#### B. Contract Law Principles Applied

The majority concedes that "when a contract is silent regarding the time for performance, a reasonable time is presumed[.]" *Ante* at 14. The purchase agreement deliberately omitted a specific time for performance apart from stating that it would occur in 2005. The law thus

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<sup>1</sup> In *Anderson v Liberty Lobby, Inc*, 477 US 242, 255; 106 S Ct 2505; 91 L Ed 2d 202 (1986), the United States Supreme Court construed the analogous federal rule governing summary judgment, and held that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." Accordingly, to prove entitlement to summary disposition, Randel & Associates must demonstrate that undisputed, clear and convincing evidence eliminated any material dispute regarding the parties' selection of June 3, 2005 as the firm and final closing date.

presumes that the parties would close within a reasonable time, and a jury should determine whether a reasonable time had expired when Randel unilaterally terminated the deal.

“When no time for performance is specified in [a] contract, a ‘reasonable time’ is implied.” *Smith v Michigan Basic Prop Ins Ass’n*, 441 Mich 181, 191 n 15; 490 NW2d 864 (1992) (internal quotation omitted). What constitutes a “reasonable time” depends on the nature of the contract and the particular circumstances. *Reinforced Concrete Pipe Co v Boyes*, 180 Mich 609, 616; 147 NW 577 (1914). “Where facts are in dispute, it presents a question of fact for the jury.” *Id.* Parties may agree to modify a contract, even when the contract “protects itself against certain methods of waiver or modification.” *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370; 666 NW2d 251 (2003). A contractual modification “can be established by clear and convincing evidence that the parties mutually agreed to a modification or waiver of the contract.” *Id.* at 372.

The parties’ contract did not include a clause confirming that time was of the essence. “The general rule is that time is not to be regarded as of the essence of a contract unless made so by express provision of the parties or by the nature of the contract itself or by circumstances under which it was executed.” *MacRitchie v Plumb*, 70 Mich App 242, 246; 245 NW2d 582 (1976). Even when a contract specifies a time for performance, the parties may waive or modify the time by oral or written agreement extending it. *Waller v Lieberman*, 214 Mich 428, 437-438; 183 NW 235 (1921).

Paragraph 5 of the purchase agreement reads, “It is acknowledged by Seller that Purchaser is financing \$575,000.00 through a licensed lending institution representing the majority of the down payment by Purchaser to Seller, and that this sale is contingent upon consummation of that loan and qualifications developing there from . . . .” The purchase agreement further provides in § 20.13(d) that it “may be terminated by Seller or Purchaser at any time prior to the Closing Date” “by either party to this Agreement if closing of the transactions contemplated by this Agreement has not been fully completed by \_\_\_\_\_, unless the date is extended by the written consent of all of the parties to this Agreement.” Read in the context of the entire contract, the absence of definite closing and financing completion dates reflects that the parties intended to maintain flexibility in this regard. Because the parties elected against identifying a “drop dead” date for performance of the accounting practice sale, the law imposes a reasonable time requirement.

Indisputably, the parties remained at liberty to modify their contract by selecting a date certain for the closing. However, “a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract.” *Quality Products*, 469 Mich 372. Our Supreme Court emphasized in *Quality Products*, *id.* at 372-373,

Where mutual assent does not exist, a contract does not exist. Accordingly, where there is no mutual agreement to enter into a new contract modifying a previous contract, there is no new contract and, thus, no modification. Simply put, one cannot unilaterally modify a contract because by definition, a unilateral modification lacks mutuality.

Mutual assent to modify a contract must be proven by “clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract.” *Id.* at 373.

Although Alef and Weiss had discussed a possible closing date of June 3, 2005, the record lacks clear and convincing evidence that the parties mutually agreed that the deal would close *no later than* June 3, 2005. Rather, the record reveals that in the course of their dealings, Weiss and Alef discussed several potential closing dates, and repeatedly agreed to forestall the closing while Zerbo Mullin sought to resolve its problem with Raguso. And no evidence suggests that time was of the essence to any of the parties in closing the deal. Furthermore, Weiss’s June 9, 2005 letter, stating that “[u]nless I hear otherwise from you by July 15, 2005, I will be releasing the escrow Deposit to my client,” supports a reasonable inference that Randel had agreed to keep the deal open until July 15, 2005. Viewed in the light most favorable to Zerbo Mullin, the record evidence does not clearly, convincingly, or indisputably prove the existence of a mutual agreement to modify the terms of the original contract by inserting a binding closing date.

I would conclude that in light of the governing law imposing a reasonable time period for the closing, and given the existence of material questions of fact with respect to when the closing had to occur, the circuit court improperly granted summary disposition to Randel & Associates.

/s/ Elizabeth L. Gleicher